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Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PATRICK H. WRIGHT, JR. and WILLIAM E. ARMSTRONG,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Petitioners, an assistant city attorney and a private lawyer, were convicted under the Hobbs Act, 18 U.S.C. §1951, of fixing a single driving-while-intoxicated traffic charge in a municipal court and of conspiracy. The courts below found that the effect on interstate commerce required by the Hobbs Act was established by evidence that, in general, the failure to prosecute DWI cases increases the incidence of driving while intoxicated which in turn generally increases accidents which interfere with commerce. There was no evidence that the allegedly extortionate act of the petitioners caused more DWI offenses, caused more accidents or in any way affected commerce. The question presented for review is whether this theory of impact on interstate commerce was sufficient as a matter of law to establish jurisdiction under the Hobbs Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Patrick H. Wright, Jr. and William E. Armstrong respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 18, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 797 F.2d 245 and appears in the Appendix to the petition. The opinion on rehearing rendered on November 6th is not reported but is reproduced in the Appendix. The opinion of the District Court for the Western District of Louisiana, which is not reported, also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on August 18, 1986. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on September 2, 1986. The petition for rehearing was denied on November 6, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the

District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

The petitioners were indicted in the Western District of Louisiana with having violated the Hobbs Act, 18 U.S.C. § 1951, and with conspiracy to violate the Act. The indictment charged that William Armstrong, as an Assistant City Attorney for the City of Monroe, had solicited and received money from Patrick Wright, a private attorney, in order to prevent the prosecution of Wright's client, William E. Burns, on a driving-while-intoxicated (DWI) charge. Wright was charged in a separate count with having aided and abetted Armstrong in his violation of the Hobbs Act. A third count charged Wright and Armstrong with conspiracy to extort money from Wright's clients and his law firm in order to prevent prosecution of Wright's clients on DWI charges in the Monroe City Court. (R. 1-5) Petitioners waived a jury trial and were tried before Judge Nauman S. Scott of the Western District in February, 1985.

At trial, the government showed that William E. Burns was involved in an automobile accident on a public street in Monroe in November, 1980. Burns was severely injured in the accident and was taken by ambulance to a local hospital. (R. 49-50, 61-65) At the hospital a Monroe police officer who was investigating the accident, requested that a blood sample be taken from Burns who was unconscious at the time. The blood sample was forwarded to a state laboratory for analysis. (R. 51) The analysis of Burns' blood, which was received by the officer several weeks later, showed that Burns was intoxicated

at the time of the accident. An arrest warrant was issued charging Burns with DWI. (R. 51-53, 68-71) Burns had been released from the hospital by this time and was not arrested.

In early 1981, Burns heard from a friend on the police force that a warrant had been issued for his arrest and went to see Armstrong to inquire about the charge against him. Armstrong could not tell from the records in his office whether a warrant had been issued. He told Burns, however, that he would probably need legal representation and gave him the names of several attorneys, one of whom was Patrick Wright. (R. 1465-73) Burns subsequently retained Wright to represent him in a personal injury action against the owner and operator of the commercial vehicle that was involved in the accident. (R. 1625-30) Wright filed a damage suit for Burns in state court in May, 1981. (Tr. 1634)

The Burns arrest warrant remained open and unserved in the Monroe Police department for more than two years. Although Burns worked in Monroe and lived in a nearby community he was never arrested. (R. 325-26, 1638-40) The failure of the police to make the arrest was never explained. In March 1982, William Armstrong withdrew the arrest warrant and the prosecution was dismissed. (R. 1475-80) Armstrong testified that he did so because the blood test showing that Burns was intoxicated was inadmissible under state law[1] and because the charge had prescribed.[2] (R. 1475-80)

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[1] Under La.R.S. 32:661 a blood sample may not be taken from a driver for purpose of testing, without his consent, unless he has been placed under arrest. *State v. Sherer*, 354 So.2d 1038, 1042 (La. 1978); *City of Baton Rouge v. Mitchell*, 325 So.2d 588, 590 (La. 1976). Burns was unconscious at the time the sample was taken from him and was never under arrest. (R. 51-52, 66)

[2] Under La.C.Cr.P. Art. 578 the trial of a misdemeanor must be commenced within one year of the institution of a prosecution. The prosecution is commenced within the meaning of Art. 578 by the

In May, 1982, William Burns' personal injury action was settled for $35,000. Out of the attorney's fee obtained from the settlement, Wright paid Armstrong $3,000 which was roughly a third of the total attorney fee. (R. 1648-50) The reason for this payment was the central contested issue at trial. The uncontradicted evidence showed Burns' civil action was not benefitted by the dismissal of the criminal charge.[3] The government, nevertheless, contended that the amount was a pay-off for Armstrong's dismissal of the DWI charge. Armstrong and Wright testified that it was a referral fee paid because Armstrong had sent Burns to Wright. (R. 1485-87, 1649-50)

In addition to evidence concerning the Burns case, the government showed that over a period of approximately three years, prosecutions against five of Wright's other clients charged with DWI were either *nol prossed* or deferred by Armstrong. Wright testified without contradiction that during the same period five of his other clients either pled guilty or went to trial on DWI charges. The prosecutor in each case was Armstrong. (R. 1607-23) Other than the payment made in the Burns case, there was no showing that Armstrong received any money from Wright.

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swearing out of an arrest warrant. *State v. Whalen*, 470 So.2d 546 (La.App. 1st Cir. 1985). Burns' arrest warrant was sworn out in December 1980. (R. 52-53)

[3] Neither a DWI conviction nor an outstanding charge would have been admissible against Burns in the civil proceeding. The defense attorney in the civil case testified that by the time the case settled, the defendants had nothing to gain from the criminal prosecution. (R. 168-70) Burns' blood test was, however, admissible in the civil proceeding regardless of the status of the DWI case. (R. 158, 171) All concerned with the civil case agreed that, in light of the severity of Burns' injuries, the settlement was low and was heavily influenced by the fact that the blood test results were admissible in the civil case. (R. 170-76, 1645-46)

To establish that the alleged extortion had the impact on commerce required by the Hobbs Act, the government called a traffic safety specialist who testified that when the public "through the press or word of mouth" becomes aware that people arrested for DWI are not being prosecuted the deterrent effect of the criminal sanctions is diminished and that failure to prosecute has a demoralizing effect on police which may result in fewer arrests. (R. 938-44) The witness concluded that failure to vigorously prosecute DWI charges may increase drunk driving and thus impact on highway safety. (R. 960) The expert witness testified from his general experience and knowledge. He had made no study of Monroe, was not familiar with the DWI charges involved in this case, with the practices of the Monroe City Court, or of the effect of non-prosecution of these DWI cases on the citizens of Monroe or on the Monroe Police Department. There was no evidence of any kind that the failure to prosecute William Burns or any of Wright's other clients had caused more DWI offenses or more accidents on the highways.

The district judge found that Armstrong and Wright "did conspire to and that Armstrong did recall the arrest warrant and remove the threat of Burns' DWI prosecution to help Pat Wright bring about the successful settlement of a very poor law suit and to receive a payment out of the settlement proceeds as agreed by Wright and Armstrong." (R. 1856) With respect to the jurisdictional issue, the trial judge, relying on the expert's testimony, concluded that, "the failure to prosecute DWI offenses in return for the payment of money adversely affected interstate commerce . . ." (R. 1859) Armstrong and Wright were each convicted of one substantive count (those relating to the Burns case) and of one count of conspiracy. They were each sentenced to serve two years in prison. (R. 127).

On appeal, a panel of the Fifth Circuit affirmed. Judge John R. Brown dissented on the grounds that the government's evidence of extortion was insufficient as a matter of law[4] and that the alleged extortion did not have the effect on interstate commerce required by the Hobbs Act. In its opinion denying rehearing, the panel succinctly explained its ruling on the jurisdictional issue:

> Irrespective of whether we are sympathetic with a result that puts the federal government in the business of prosecuting petty crime of a purely local concern, we cannot say that the government has failed to establish every element required by the Hobbs Act, including a connection with interstate commerce, as elucidated in cases from this and other circuits as well as the Supreme Court.
>
> To explain the majority holding in this case in its simplest terms, the district court found as a fact that the failure to prosecute drunk driving increases the number of wrecks on interstate highways. Wrecks on the highways impede the flow of interstate commerce thereby establishing the required connection between the extortionate conduct and interstate commerce. This connection fully satisfies the standard established in our cases that hold that the Hobbs Act requires only a minimal impact on interstate commerce. *E.g., United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980); *United States v. Summers*, 598 F.2d 450, 454 (5th Cir. 1979).

REASONS FOR GRANTING THE WRIT

The courts below held that the government could sustain its burden under the Hobbs Act of establishing an impact on interstate commerce by showing that the conduct of defendants falls within a class of activity which,

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[4] Judge Brown determined that the Burns DWI prosecution had prescribed under Louisiana law. See *supra*, note 2. He concluded that, had the trial judge not made a "flagrant error in Louisiana law," he could not have found the defendants guilty beyond a reasonable doubt. 797 F.2d at 254.

in the aggregate, could affect commerce. Prior to this decision, no court had ever extended the Hobbs Act to apply to conduct having such an indirect and speculative connection with commerce. The decision below is in conflict with decisions in the Seventh, Fourth and Second Circuits which hold that, though the effect of defendants' conduct on commerce need not be great, the impact must be real and may not be a speculative or "one-step-removed" kind of effect. The decision further conflicts with the interpertation this Court has given the effect on-commerce requirement of the Hobbs Act.

The Fifth Circuit's decision in this case enables the government to prosecute under the Hobbs Act any kind of extortion or bribery, regardless of the circumstances. Congress did not, however, intend in the Hobbs Act to provide a vehicle for the federal government to prosecute extortion or bribery generally. *United States v. Culbert*, 435 U.S. 371, 377 (1978); *Stirone v. United States*, 361 U.S. 212, 218 (1960). Judge Brown argued in his dissent below that, "[s]ince it must be the effect which the *extortion* has on interstate commerce, not all of the far-fetched contingent consequences, I think we should sound once and for all to United States Attorneys and District Courts not to reach out to the Hobbs Act to bring every crooked small-time officeholder to justice." 797 F.2d at 255-56. The message of the panel decision is exactly the opposite of that urged by Judge Brown. As a practical matter the decision relieves the government of any obligation to prove an effect on commerce, for it is impossible to imagine any conduct that could not be fit within a class of activities which, taken as a whole, would have some minimal effect on commerce.

By its terms, the Hobbs Act does not prohibit extortion or robbery generally. Some statutes have been enacted by Congress pursuant to the commerce clause of the Constitution which are intended to regulate a *class of activities* that Congress has found to affect interstate

commerce in the aggregate.[5] In passing the Hobbs Act, however, Congress made no such decision as to the effect of extortion or robbery *generally* on interstate commerce. The Hobbs Act applies only to robbery or extortion which actually "obstructs, delays, or affects" interstate commerce. As this Court stated in *Stirone v. United States*, *supra*, 361 U.S. at 218:

> [T]here are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only upon that interference.

The required connection between the extortionate act and commerce can be established by proof of a direct interference with interstate shipments, see *Stirone v. United States*, *supra*, or through proof that the extortion has depleted the assets of an enterprise engaged in interstate commerce. Under the depletion of assets theory, commerce is affected when a business which customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's ability to purchase such goods. See *e.g.*, *United States v.*

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[5] The Consumer Protection Act, 18 U.S.C. § 891, for example, prohibits extortionate credit transactions without any reference to commerce. In upholding the Act against a constitutional challenge, this Court concluded that Congress could find that a whole class of activities affected commerce and then proceed to regulate all conduct of that class, even though some examples of such conduct were purely intrastate in nature. *Perez v. United States*, 402 U.S. 146, 153-55 (1971). Similarly, the Court upheld the public accommodation provisions of the 1964 Civil Rights Act on the ground that Congress could legislate with regard to a class of activities because it had determined that the "total incidence" of the prohibited practice, racial discrimination in places of public accommodation, affected commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964).

Summers, 598 F.2d 450, [illegible] (5th Cir. 1979); *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978).

Recognizing the jurisdictional limitations of the Hobbs Act, the Courts of Appeal have regularly rejected efforts by the government to extend the Hobbs Act to conduct having only a secondary or remote effect on commerce. In *United States v. Elders, supra*, a city official was convicted for demanding and taking "kickbacks" from a private business which did work for the city. On appeal, the government argued that, because the kickbacks artificially inflated the prices paid by the town for the work, the city treasury was depleted of funds that would otherwise have been available for municipal projects requiring the use of goods shipped in interstate commerce. The Court of Appeals summarily disposed of this contention and reversed the conviction:

> This weak argument is indicative of the frailty of the Government's position that Hobbs Act jurisdiction exists in this case. Although the Act requires only a *de minimis* effect on commerce, the effect must still be more than a speculative, attenuated "one step removed" kind of effect.

569 F.2d at 1025.

In *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982), a building maintenance worker, at the urging of his employer, applied for an electrician's license from the City of Chicago. The defendants, who were city employees, were convicted under the Hobbs Act for extorting money from the worker in connection with his license application. The Seventh Circuit reversed. Noting that a different case would be presented if the victim's employer, which was a business engaged in commerce, had been the victim of the extortion, the Court of Appeals held that the employee was not engaged in interstate commerce at all. The court refused to extrapolate an effect on the business from an effect on the business's employee. The government also argued that since the

employer and the electrical contractor which regularly did the employer's work were engaged in interstate commerce, Hobbs Act jurisdiction existed because had the employee obtained the license, the employer's financial condition would have improved and the contractor would have lost business. The Seventh Circuit also rejected this jurisdictional theory.

> This argument, . . . overlooks the point that the alleged conspiracy to extract money from Anderson did not *in and of itself affect interstate commerce.*
>
> * * * *
>
> The Hobbs Act requires that interstate commerce be affected *by extortion*, not by a result of extortion; there must be a nexus between extortion and interstate commerce before federal jurisdiction is present. The only nexus here was between the extortion of Anderson and his position as an employee of Playboy. Adding a second connection, between Playboy's potentially increased assets and interstate commerce, does not satisfy the jurisdictional requirement. Such a nexus, drawn by adding an additional party and more "tying together" to the well-established depletion-of-assets analysis, is too indirect.

671 F.2d at 1024-25.

The Seventh Circuit has plainly held that Hobbs Act jurisdiction cannot be established through a possible secondary effect of the extortion on entities other than the victim of the extortion. In this case the only person who paid money to Armstrong was Wright. The courts below did not, however, base jurisdiction on any effect on Wright, who was no more engaged in commerce than the victim in *Mattson*. Instead, the courts based jurisdiction on suppositions concerning effects on other persons several steps removed from the payment of the money by Wright. The jurisdictional theory adopted by the courts below was far more attenuated than that rejected by the Seventh Circuit in *Elders* and *Mattson*.

The Second and Fourth Circuits have also held that extortion from an entity that is not an on-going business with recurrent interstate purchases does not satisfy the jurisdictional requirement of the Hobbs Act. See, *United States v. Merolla*, 523 F.2d 51, 54-55 (2d Cir. 1975) (extortion from a "one shot" enterprise that did no subsequent interstate business does not affect commerce); *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985) (extortion from a sham business set up by the FBI did not have the required affect on commerce). The conduct of the defendants in *Merolla* and *Brantley* was certainly the type of activity which, in the aggregate, would affect commerce. These decisions thus emphasize that the effect-on-commerce requirement of the Act cannot be founded on the potential effect of the *class* of activity engaged in by the defendants in the aggregate. By contrast, the courts below reasoned that since failure to prosecute DWI cases, in the aggregate, may cause more accidents, an individual instance of failure to prosecute need not have such an impact to qualify for Hobbs Act coverage.

Three circuits have now held that in a Hobbs Act prosecution the effect on commerce must be an *effect of the extortion* and not an effect of the result of extortion or an effect presumed to arise from a class of conduct in which the defendant has participated. Here the district court and the Fifth Circuit found jurisdiction on a several-step-removed, presumed kind of effect on commerce. The trial judge concluded that Armstrong's failure to prosecute Burns and five of Wright's other clients was the kind of law enforcement failure that undermined deterrence and indirectly resulted in more accidents. (R. 1859) The trial judge did not find and, indeed, could not have found, that Armstrong's decision not to prosecute these DWI cases actually caused more accidents or interfered in any way with commerce. There was no evidence that William Burns or any of Wright's other clients

had subsequently been guilty of DWI or involved in accidents. There was no evidence whatsoever that the public was aware of the handling of these cases or that the morale of the police force was affected in any manner. To the Fifth Circuit this gap in the government's proof was unimportant. It concluded that drunk driving generally affects commerce and that, taken in the aggregate, the failure to prosecute drunk drivers increases the incidence of drunk driving and thus the number of accidents. The court in effect held that a specific instance of the type of conduct which in the aggregate may ultimately impact on commerce, "obstructs, delays, or affects commerce" within the meaning of the Hobbs Act. The reasoning of the Fifth Circuit plainly conflicts with the construction given the Hobbs Act by the Seventh, Fourth and Second Circuits and is at odds with this Court's holding in *Stirone v. United States, supra,* that only extortion which interferes with commerce is covered by the Act.

Prior to the decision below, no court had ever allowed the government to establish Hobbs Act jurisdiction with a showing of an impact on commerce less direct than the depletion of assets of an enterprise engaged in commerce. The Fifth Circuit did not attempt to distinguish the decisions of other circuits or to rationalize its opinion as consistent with the legislative history of the Hobbs Act or the decisions of this Court. The Fifth Circuit justified its affirmance by stating that the jurisdictional showing "fully satisfies the standard established in our cases that hold that the Hobbs Act requires only a minimal impact on interstate commerce." (Denial of Rehearing at 2) While the impact on commerce need not be great, it nonetheless must exist. This requirement of the Act cannot be glossed over on the ground that only a minimal effect is required. The government did not make such a showing in this case. The Court of Appeals' opinion below runs contrary to the purpose of the Hobbs Act as

explained by this Court in *Stirone v. United States* and is without support in any circuit including the Fifth Circuit. The decisions cited by the Court of Appeals to support its assertion that the government's proof "fully satisfies the standard established in our cases," *United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980) and *United States v. Summers, supra*, demonstrate how far afield the court has gone in this case. Jurisdiction in both *Sander* and *Summers* was explicitly founded on the depletion of assets theory. In both cases the victim of the extortion was an on-going business, actively engaged in interstate commerce.

CONCLUSION

The decision below conflicts with decisions of other courts of appeal with respect to the proper interpretation of the effect on commerce requirement of the Hobbs Act. As the Fifth Circuit recognized, its decision opens the door to federal prosecution of conduct of purely local concern having no real effect on commerce between the states. This was plainly a matter in which the federal government should not have been involved. To resolve a conflict among the circuits and an important issue of statutory construction, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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January 5, 1987

APPENDIX

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4208

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

PATRICK H. WRIGHT, JR., and WILLIAM E. ARMSTRONG,
Defendants-Appellants.

Aug. 18, 1986

Before BROWN, JOHNSON and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Two attorneys appeal their convictions for violating the Hobbs Act, 18 U.S.C. § 1951, by conspiring to extort and by extorting money from a law firm and its clients in exchange for not prosecuting drunken drivers in city court in Monroe, Louisiana. The appeal presents us with the question whether there was sufficient nexus between the alleged extortionate crimes and interstate commerce to support this federal prosecution. The defendants argue that their acts had only an attenuated impact on interstate commerce, an interference so remote as to amount to no effect at all. We hold, however, that the alleged extortionate conduct was shown at trial to have an im-

pact on interstate commerce sufficient to support a finding that the interstate commerce element of a Hobbs Act violation was proved by the prosecution. We also hold that the evidence adduced at trial was sufficient to convict the defendants of both a conspiracy and extortionate conduct in violation of the Hobbs Act. We therefore affirm.

I.

The defendant Patrick Wright was City Attorney for Monroe, Louisiana. He hired the defendant William Armstrong as an assistant city attorney. Wright resigned in July 1980 to enter private practice, while Armstrong remained assistant city attorney until he was removed in March 1984. Between late 1980 and mid-1983, Armstrong was the only assistant city attorney handling traffic offenses.

Wright's private practice included personal injury, real estate, domestic relations, and defense of "driving while intoxicated" (DWI) cases. He defended a large number of DWI cases that were prosecuted by Armstrong. Some of these cases went to trial, some ended with a guilty plea, and some resulted in "DA's probation" for Wright's clients.

"DA's probation" is a practice common in Monroe City Court whereby the city agrees to defer prosecution on the condition that the defendant avoids further trouble. After one year of DA's probation, the charges are generally allowed to prescribe. The decision to use DA's probation is discretionary with the city attorney.

The convictions of Wright and Armstrong resulted from allegations involving six of Wright's clients: Burns, Hill, Gohn, Newman, Tallant and Mathieu. The conspiracy count was proved with evidence relating to all six cases, while the substantive counts were proved with evidence from only the Burns case. In each of the six

cases, the defendant was arrested and charged with DWI, but no prosecution occurred.

The Hill case was "nol prossed" after the charges were deemed to have prescribed. The Gohn, Newman, Tallant, and Mathieu cases were either reset or continued without date certain under DA's probation, and no further action was taken on them. The Burns case, however, was more complicated. An arrest warrant was sworn out for Burns in December 1980, but by March 1982, having not been executed, it was recalled by Armstrong. Service was never successfully made on Burns, and Armstrong recalled the warrant, ostensibly because the DWI charges against Burns had prescribed under La.Code Crim.Proc. art. 578 (West 1981).

When Burns heard that there was a warrant outstanding for his arrest, he contacted Armstrong concerning his situation. In the course of their conversation, Armstrong suggested that Burns retain a lawyer to institute a civil action for injuries sustained by Burns in the accident. Armstrong recommended several attorneys, including Wright. Burns retained Wright to represent him in a civil action and signed a one-third contingent-fee contract with Wright. Burns' lawsuit was filed in May 1981, and was handled almost entirely by Jack Wright, Wright's young associate. After the court ruled on a motion in limine and admitted the results of a blood alcohol test showing that Burns had been legally intoxicated at the time of the accident, the case was settled in June 1982 for $35,000.

After the settlement was agreed upon, Wright told Jack Wright that Armstrong was to receive a referral fee from the Burns case of approximately one-third of attorney's fee. When Jack Wright protested this arrangement, Wright spoke to Armstrong about the size of the fee, and the two of them agreed that Armstrong should take $3,000. Burns received approximately

$21,000 after expenses, and Jack Wright with co-counsel shared the remainder.

Eventually some complaint was made (by whom it is unclear), and Patrick Wright and William Armstrong were indicted for having violated the Hobbs Act, 18 U.S.C. § 1951, and for conspiring to violate the Act. All of the counts involved alleged extortion by the City Attorney's Office of Monroe, Louisiana, in connection with the prosecution of DWI cases in Monroe City Court. Both defendants were convicted in a bench trial on one count of conspiracy (Count IV), having waived their right to a trial by jury. Armstrong was additionally convicted on one count of a substantive violation, i.e., that under color of official right, he solicited and received from Wright $3,000 in return for preventing the DWI prosecution of Wright's client, Burns (Count V). Wright was convicted on one count of aiding and abetting Armstrong in the substantive violation (Count VI).

The district court denied the defense motions for arrest of judgment and for a new trial. Wright and Armstrong were each sentenced to serve two concurrent two-year terms. Both Wright and Armstrong have filed timely appeals.

II.

The first of the defendants' arguments on appeal is that the government has failed to establish that the extortion affected interstate commerce. By statutory definition, in order for the extortion to constitute a federal crime under the Hobbs Act, some connection must be established between the extortionate conduct itself and interstate commerce. 18 U.S.C. § 1951(a). "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." *Stirone v. United States*, 361

U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960).[1] The interstate commerce connection is determined on a case-by-case basis.

Although the government raises several theories on appeal, the district court, in its judgment of conviction, relied on only one theory when it found sufficient effect on interstate commerce. Crediting expert testimony that local failure to prosecute DWI cases encourages more drunken driving, which jeopardizes highway safety by causing more accidents, and thus interferes with interstate travel on interstate highways, the district court found that "the failure to prosecute DWI offenses in return for the payment of money adversely affected interstate commerce. . . ." The defendants argue that this was error because the government did not prove that the

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[1] The relevant language of the statute is as follows:

Interference with commerce by threats or violence

(a) Whoever in any way or degree *obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,* by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

. . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State or territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(a) and (b) (emphasis added).

acts alleged in the indictment had an impact or effect on interstate commerce. According to Wright and Armstrong, the government's theories on interstate commerce are based on speculation and are too attenuated to show a nexus between the criminal conduct and interstate commerce.

The Supreme Court has long recognized that the purpose of the Hobbs Act is to "use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Stirone*, 316 U.S. at 215, 80 S.Ct. at 272. In addition, the Court has recognized that Congress intended to define as a federal crime conduct that it knew was already punishable under state law. *United States v. Culbert*, 435 U.S. 371, 379, 98 S.Ct. 1112, 1117, 55 L.Ed.2d 349 (1978). The legislative history indicates that Congress believed that the states had not been effectively prosecuting extortion that affected interstate commerce," and that the federal government had an obligation to do so." *Id.*, 435 U.S. at 380, 98 S.Ct. at 1117; 91 Cong. Rec. 11848, 11904, 11911, 11920 (1945).

The law in this circuit seems pretty clear that the impact on interstate commerce need not be substantial to meet the statutory requirement. All that is required is that commerce be affected by the extortion "in any way or degree." *United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980); *United States v. Summers*, 598 F.2d 450, 454 (5th Cir. 1979); *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978); *United States v. Amato*, 495 F.2d 545, 548 (5th Cir. 1974); *United States v. Nakaladski*, 481 F.2d 289, 298 (5th Cir. 1973). *See also United States v. Hyde*, 448 F.2d 815, 836-37 (5th Cir. 1971).

In the case before us, the district court relied on the testimony of a government witness, Robert Voas, qualified as an expert in the field of alcohol and highway safety. Mr. Voas testified that the consumption of alco-

hol is "a major, perhaps the major factor in causing highway accidents." His experience evaluating law enforcement techniques in the area of DWI led him to conclude that the more serious an automobile accident is, the more likely it is that a drinking driver is involved. Voas also testified that a person who has been arrested for DWI has a much greater chance of later being involved in a fatal accident than has a person with no DWI arrest or conviction record. It was Voas' opinion that the higher risk can be reduced either by treating the drinking driver or by suspending or revoking his driving privileges. Voas also testified that when the public becomes aware, either through the press or by word of mouth, that people arrested for DWI are not being prosecuted, then the deterrent effect of criminal sanctions is diminished. Failure to prosecute cases where the evidence is sufficient to sustain a conviction has a demoralizing effect on police officers to the point that they tend to make fewer arrests. Finally, Voas testified that alcoholism is a tremendous problem in the United States, costing the nation one hundred billion dollars per year in medical expenses and lost working time, and that people with drinking problems who finally do seek help often do so because they have been arrested and prosecuted on a charge of drunk driving.

The district court, clearly acting within its prerogative, credited this testimony, and relied on it to find that the government had proved the interstate commerce element of a Hobbs Act crime. Once the conclusion of this expert is accepted, the defendants' argument that the government has over-reached itself by prosecuting acts having an insufficient nexus with interstate commerce must be rejected. The district court's findings to support its conclusion on interstate commerce are not clearly erroneous, and we are powerless to disturb them. *See United States v. Dayton*, 604 F.2d 931, 940 (5th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d

320 (1980) (general agreement that the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) is to be applied to findings by judges in criminal proceedings where a jury has been waived) (citing 2 C. Wright, *Federal Practice and Procedure* § 374 (2d ed. 1982)). *See also United States v. Penn*, 721 F.2d 762, 765-66 (11th Cir. 1983).

Finally, we note that the government introduced evidence on other theories of interstate commerce to support its contention that the defendants' actions are within the scope of the Hobbs Act. The defendants argue that because these other theories were not alleged in the indictment, the district court erred by allowing the government to amend, in effect, the indictment by attempting to prove an interstate commerce connection not alleged in the indictment. We find it unnecessary to address this contention of the defendants because the district court, in its judgment of conviction, relied only on evidence relevant to the commerce connection that was alleged in the indictment. Because this evidence was relied on by the district court to support the defendants' convictions, it is irrelevant that the government adduced extraneous evidence on the interstate commerce issue.

III.

We next consider whether the evidence adduced at trial is sufficient to prove extortion within the meaning of the Hobbs Act, that is, to support the Count V conviction of William Armstrong of soliciting and receiving, under color of official right, $3,000 from Wright and his law firm to prevent the DWI prosecution of Wright's client, Burns.

A conviction under the Hobbs Act may be sustained by a finding that a public official has taken a fee, unlawfully, under color of his public office, in return for performance or nonperformance of an official act. There is no requirement that threat, force, or duress be proved when the defendant is a public officer. *United States v. Williams*,

621 F.2d 123, 124 (5th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). "The coercive element is supplied by the existence of the public office itself." *Id.* at 124; *see also United States v. Sorrow*, 732 F.2d 176, 179-80 (11th Cir.1984).

The defendants here are attacking their convictions on the grounds of insufficient evidence. The district court, noting that Armstrong had referred Burns to Wright, concluded from the evidence that Armstrong's withdrawal of the warrant for Burns' arrest was the result of Wright's agreeing to pay a fee to Armstrong. Armstrong and Wright argue that the evidence does not support the district court's conclusion in this regard, claiming that the decision was made not to prosecute Burns because the results of his blood alcohol test would have been inadmissible at a criminal trial, that the charges against Burns had prescribed, and that the money Armstrong received from Wright was a routine referral fee paid pursuant to settlement of the Burns civil case.

A.

The district court found that Armstrong did recall Burns' arrest warrant and that Armstrong "made different excuses at different times as to why he took the action." Armstrong argues on appeal that he decided not to prosecute Burns because the blood alcohol test results showing Burns' intoxication would not have been admissible at Burns' DWI trial. The blood alcohol test results were not admissible, Armstrong contends, because such tests are valid only if the subject of the test has been "arrested" at the time of the test, *see* La.Rev.Stat.Ann. § 32:661 (West supp. 1986),[2] and Burns was not under

[2] The relevant paragraphs of section 32:661 of the Louisiana Revised Statutes Annotated provide as follows:

> A. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of R.S. 32:662, to a chemical test or

arrest at the time the test was given. We are therefore confronted with the meaning of arrest as used in this statute.

The Louisiana Code of Criminal Procedure, article 201, defines arrest as follows:

> Arrest is the taking of one person into custody by another. To constitute arrest there must be an actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him.

La.Code Crim.Proc.Ann. art. 201 (West 1967 and supp. 1986). The statutory definition of "arrest" is thus tied to the concept of restraint. The circumstances indicating intent to effect an extended restraint on the liberty of the accused, rather than the precise timing of an officer's statement, "You are under arrest," determines when the arrest is actually made. *State v. Sherer*, 354 So.2d 1038, 1042 (La.1978); *State v. Marks*, 337 So.2d 1177, 1182 (La.1976).

In *State v. Sherer*, 354 So.2d 1038, the Louisiana Supreme Court expressly addressed the situation of a blood

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tests of his blood, breath, urine or other bodily substance for the purpose of determining the alcoholic content of his blood *if arrested* for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while believed to be under the influence of alcoholic beverages. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcoholic beverages. . . . .

B. Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by Subsection (A) of the section, and the test or tests may be administered subject to the provisions of R.S. 32:662.

alcohol test having been administered to an unconscious driver. *Sherer* held that in Louisiana an individual who is unconscious, in need of medical care, and obviously incapable of escape as the result of an automobile accident is "arrested" for the purposes of a blood alcohol test when a law enforcement officer evidences a clear intent to effect a restraint on the individual. In *Sherer*, the police officer at the scene of the accident told the ambulance driver that he was "placing charges" against Sherer because physical evidence indicated that Sherer had been driving while intoxicated. He also instructed the ambulance driver to obtain a blood alcohol test on Sherer. The defendant in *Sherer* remained unconscious at the hospital, "a condition rendering him incapable of refusal to submit to the alcohol blood test." The court held that the blood test was permissible and that the results of the blood test on the unconscious defendant had been properly admitted. Because it was not possible to detain Sherer anywhere other than a hospital without jeopardizing his health, and because there was no need to detain him any further since he was already unconscious and incapable of escape, the court held that the testing was done while the defendant was under "arrest" within the meaning of section 32:661. *Sherer*, 354 So.2d at 1042.

Burns' situation in the case before us is comparable to that of the driver in *Sherer*. Burns was rendered unconscious in the automobile accident. The law enforcement officer at the scene evidenced a clear intent to restrain Burns by following the ambulance to the hospital, and, once there, requesting that a blood alcohol test be done on Burns. Perhaps there was no ordinary arrest in the usual sense of the word. It obviously would have been pointless to Mirandize and take to the police station an unconscious person. Nevertheless, *Sherer* tells us, Burns was under "arrest" within the meaning of section 32:661 when the blood test was taken at the hospital. In addition, again similar to the situation in *Sherer*, Burns remained unconscious for a time at the hospital, and was incapable of

refusing to submit to the blood alcohol test. "Hence, under La.R.S. 32:661(B), his implied consent was not withdrawn; and the testing was permissible." *Id.*

Under *Sherer*, then, the results of Burns' blood test would most likely have been admissible at his DWI trial. We therefore hold that the district court did not err in discrediting Armstrong's given rationale for "nol prossing" Burns, that is, that the blood test results would have been inadmissible at Burns' criminal trial.[3]

B.

Armstrong's next argument concerns the significance of the withdrawal of the Burns arrest warrant. The evidence shows that in late February 1982, Burns' arresting officer, having recently learned Burns' correct home address, tried to retrieve the arrest warrant from police files in order to serve it on Burns. Officer Otwell could not locate the warrant, however, and was informed by Armstrong that it had been recalled because the statute of limitations had run on it. Armstrong admits that he had the Burns warrant withdrawn, but claims to have done so only after the charges against Burns had prescribed. Article 578(3) of the Louisiana Code of Criminal Procedure provides that "*no trial shall be commenced.* . . . (3) In misdemeanor cases *after one year from the date of institution of the prosecution.* . . ." La.Code Crim.Proc.Ann. art. 578(3) (West 1981) (emphasis added). Armstrong cites this provision in support of his argument that the time limit on prosecution of the Burns case prescribed in December 1981, one year after the arresting officer filed his affidavits with the city court clerk. He argues that this point

[3] Wright argues that *Sherer* is distinguishable because the attending police officer in Burns' case did not swear out an arrest warrant until after he had the test results. The *Sherer* court, however, does not indicate when the arrest warrant for Sherer was sworn out, and we decline to distinguish the two cases on grounds that appear to have been irrelevant to the Louisiana Supreme Court.

demonstrates that it was because of prescription, not because of corruption, that he did not prosecute Burns.

The district court found, however, that the one-year period begins to run not when an arrest affidavit is filed, but when a prosecution affidavit is filed at arraignment. Since no such affidavit had been filed in Burns' case, the court found that prosecution was never instituted under article 578(3); the one-year period thus never began to run and therefore could not have prescribed. Armstrong contends, and the dissent agrees, that the Burns prosecution was instituted when Officer Otwell filed his arrest affidavit in December 1980, and that therefore when Armstrong ordered the Burns arrest warrant withdrawn in early 1982, the one-year limitations period on the prosecution had prescribed.

We find it unnecessary to determine when the one-year limitations period began to run because, when considered in the context of all of the evidence, we do not view it as a critical consideration in assessing Armstrong's guilt or innocence. Even if we assume that the statute barred the prosecution of Burns in February 1982 when Officer Otwell first noticed the warrant was missing, there remains the failure to prosecute between December 1980 and December 1981 that is less than fully explained by Armstrong. The case languished in the files for at least a year with little or no action by Armstrong. Furthermore, there is no evidence that Armstrong withdrew the Burns warrant in the course of a routine purging of the oustanding warrants or that it was a practice for him personally to order the withdrawal of all time-barred warrants from the files. The evidence supports the conclusion that Armstrong accorded special treatment to that particular warrant.

In reviewing the sufficiency of the evidence to support a criminal conviction, we are obligated to view the evidence in the light most favorable to the government.

United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir.1984). Thus, even if the warrant was withdrawn after December 1981, and even if the one-year period had prescribed by February of 1982, we deem this to be of little significance in evaluating the strength of the government's case because of the other incriminating inferences that may be drawn from the entire set of facts. Irrespective of whether Burns' prosecution was time-barred in February 1982, Armstrong's overall handling and treatment of the Burns case fully supports the district court's ultimate conclusion that Armstrong was guilty of the crimes charged beyond a reasonable doubt.

IV.

The question whether the evidence is sufficient to prove Count VI of the indictment, that Patrick Wright aided and abetted William Armstrong in his extortion of money from Wright's law firm and clients, is easy to resolve.

Wright argues that as the payor of the extorted money to Armstrong, he may not be convicted of aiding and abetting or of conspiracy to violate the Hobbs Act without proof that he initiated and actively procured the violation. Wright appears to argue that because he is the one who actually made out the check to Armstrong, he is a victim of the extortion. As the payor, his argument goes, he may not be convicted of aiding and abetting the extortion unless it is shown that he "actively induced and solicited" the extortion on the part of Armstrong. For this proposition, Wright relies on *United States v. Nelson*, 486 F.Supp. 464 (W.D.Mich.1980).

Even if we were to adopt this analysis, Wright's argument on this point fails for two reasons. First, the evidence indicates that Wright did aid and abet Armstrong's extortion by actively inducing and soliciting the payment to Armstrong. He was the one who initially informed Jack Wright that Armstrong was to receive a payment of

one-third of the attorney's fees. After hearing complaints about this arrangement from Jack Wright, it was the defendant Wright who requested and convinced Armstrong to take a lesser amount from the fees. By convincing Armstrong to take the lesser fee, and by soliciting and inducing Jack Wright to pay it, Pat Wright aided and abetted Armstrong's extortion of the law firm.

In addition, we find no support for Wright's argument that he is to be viewed as a victim of Armstrong's extortionate conduct. Wright and Armstrong conspired together to extort money from Wright's law firm. Although Wright actually made out the $3,000 check to Armstrong, it was Wright's law firm that was the real payor. Thus, even if we were to follow Wright's suggestion that we adopt the *Nelson* rule for this circuit, which we do not do today, that rule would not work to the benefit of Wright. His conviction on Count VI stands.[4]

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[4] Wright also argues that the district court abused its discretion under Fed.R.Crim.P. 16 by refusing to admit certain evidence offered by the defense. Wright claims that not until the close of the government's case was he informed that the government intended to introduce five of his office files as support for the conspiracy charge. The government's theory was that the meager contents of those files indicated that Wright did not intend to try those cases, and that this was circumstantial evidence of Wright's knowledge that the cases in question would not be prosecuted. Wright admits that he knew the government planned to introduce some of his office files, but complains that he was unaware of the government's theory regarding the files until just before the government rested.

When Wright then moved for the admission of all the remaining 1983 DWI files from his office, ostensibly to show that they, too, were "thin" files, the district court ruled them inadmissible because they had not been shown to the government before it rested its case, and because they were quite possibly unreliable items of evidence. We find no error in the district court's ruling. We note especially that Wright knew prior to trial that the government planned to introduce several of the relevant files from his office. Wright does not claim that he was denied the pretrial opportunity to tender, for later introduction into evidence, any of his DWI

V.

Armstrong next argues that the district court erred by admitting into evidence extra-judicial statements, alleged to have been made by Patrick Wright, without the government's having established by a preponderance of evidence independent of those statements that an illegal conspiracy existed between Armstrong and Wright. Wright makes the same argument in reference to out-of-court statements made by Armstrong. We are guided by the rule that a declaration by one defendant is admissible against another defendant only when there is a sufficient showing, by independent evidence, of a conspiracy among the defendants, and when the declarations at issue were made in the course of and in furtherance of the conspiracy. *United States v. James*, 590 F.2d 575, 581 (5th Cir. 1979) (en banc); Fed.R.Evid. 801(d)(2)(E).

The district judge relied on the following evidence when making his finding of a conspiracy: Wright gave Armstrong a check for $3,000 in June 1982, after the Burns charges were dropped; unlike most other Wright account checks, there was no notation on the $3,000 check as to its purpose; neither Burns nor anyone in Wright's law firm was aware of any referral fee arrangement with Armstrong; the files on four DWI offenders, Gohn, Newman, Tallant, and Mathieu, who were represented by Wright, were missing from the Monroe City Attorney's office in March 1984 when Armstrong was removed from office.

Proof of a conspiracy does not require direct evidence of an actual agreement between the co-conspirators, but

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office files. We also note that because the office files that Wright sought to introduce were solely within his control during the entire trial, up to and including the morning after the government rested its case, it was not an abuse of Rule 16 discretion for the district court to question the reliability of such evidence and deny its admission on that ground. We therefore find no merit to Wright's arguments on this point.

may be inferred from circumstantial evidence. *United States v. Reed*, 715 F.2d 870, 874 (5th Cir. 1983). The district court found the evidence sufficient to support a finding of conspiracy. Our standard of review for insufficiency of the evidence is whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. The fact-finder may choose among reasonable constructions of the evidence. *United States v. Carpenter*, 769 F.2d 258, 259 (5th Cir. 1985). "The evidence and the inferences drawn from it are viewed in the light most favorable to the government." *Id.* Viewing the case as a whole, we find that the independent evidence was sufficient to support the judge's finding of conspiracy between Wright and Armstrong, and that it was not error to admit the statements of either to be used as evidence against the other.

VI.

We affirm the district court's finding a nexus between interstate commerce and the defendants' extortionate conduct sufficient to sustain federal prosecution. We also agree with the district court that the evidence adduced at trial was sufficient to support the convictions of each defendant for his respective violations of the Hobbs Act. The judgment of the district court is

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting.

This is a case that ought never to have been brought, certainly not in the United States District Court. It involved conduct by two Louisiana lawyers that would merit severe disciplinary action by either the *Louisiana Bar or the Louisiana courts, or both.* And, indeed, it was the revulsion of the distinguished District Judge to these flagrant transgressions of elemental legal ethics that brought down his strong condemnation in the form of a conviction for violation of the Hobbs Act because of the

interference of these local activities with interstate commerce.

Critical to the judge's factual finding of federal culpability was his rejection of Armstrong's insistence that the reason he, the prosecutor, declined further prosecution was that prosecution was prescribed under the Louisiana one year time limit. My analysis demonstrates that the judge was flatly wrong on this question of Louisiana law.

Here, Armstrong strenuously urged that the reason he recalled Burns' arrest warrant was, not because of any payment or the expectation of any payment from Wright, but because the case against Burns had prescribed under the Louisiana law which requires prosecution within one year. The trial judge, himself experienced as a Louisiana practitioner followed by years as a Louisiana United States District Judge, rejected this out of hand on what trurns out to have been a flagrant error in Louisiana law.

Unlike the possibility of an ordinary error in state law which would likely not adversely affect the Court's judgment, this case is much different. Had the judge, in this judge trial, not made this critical error—had he realized that prosecution was indeed barred—it is clear the judge could not have found these attorneys guilty beyond a reasonable doubt.

In its effort to prove a substantive violation of the Hobbs Act, the government placed all of its prosecutorial eggs in the basket of William Burns' DWI prosecution, or more accurately, the lack thereof. Unfortunately, the government, the District Court, and now the majority overlook the fact that Burns' DWI prosecution was prescribed as a matter of law through the combined operation of La.C.Crim. Proc. arts. 578(3), 382, and 385. With Armstrong's valid argument for not prosecuting Burns, the government's entire case unravels.

La.C.Crim.Proc. art. 578(3) states that "[e]xcept as otherwise provided in this Chapter, no trial shall be commenced . . . [i]n misdemeanor cases after one year from the date of institution of the prosecution." (West 1981). The Court's opinion concludes that the one-year statute of limitations contained in article 578(3) never began to run because Burns' prosecution was never instituted. I disagree.

La.C.Crim.Proc. art. 382 spells out the various methods of instituting criminal prosecutions.

> A prosecution for an offense which may be punished by death shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information. A prosecution for violation of an ordinance shall be instituted by affidavit. Other criminal prosecutions in a city court and prosecutions in a parish court shall be instituted by affidavit or information. Criminal prosecutions in a juvenile court or family court shall be instituted by affidavit, information, or indictment.

(West 1981). Under the plain terms of article 382, any prosecution of Burns in the Monroe City Court would have to be instituted by information or affidavit. Article 385 defines affidavit as "a written accusation of crime made under oath and signed by the affiant. It must be filed in open court in a court having jurisdiction to try the offense, *or in the office of the clerk thereof.*" La.C. Crim.Proc. art. 385 (West 1981) (emphasis added). *See State v. Kimble*, 411 So.2d 430, 433 (La.1982) (accusations in traffic ticket printed in affidavit form may be sufficient to institute prosecution if made under oath or sworn to); *City of Pineville v. Robinson*, 260 La. 415, 256 So.2d 427 (1972) (affidavit form traffic ticket instituted prosecution where properly sworn to, subscribed before the clerk of the court, and contained sufficient

information to inform the accused of the nature of the offense charged).

The record reveals that Patrolman Herbert Otwell of the Monroe Police Department executed arrest and prosecution warrants of William Burns on December 3, 1980. The warrants were sworn under oath and signed by Patrolman Otwell. They were filed with Frances O'Neal, a commissioned Deputy Clerk of the Monroe City Court. The statutory requirements for instituting Burns' prosecution were met on December 3, 1980, and the one-year prescriptive clock began ticking on that date. When Armstrong ordered the arrest warrant of Burns withdrawn in March 1982, much more than one year had passed since the prosecution was instituted. The prosecution was therefore prescribed.

The Court's opinion erroneously relies on *State v. Jones*, 443 So.2d 639 (La.App. 1983), and *State v. Gladden*, 260 La. 735, 257 So.2d 388 (1972), for the proposition that only the filing of a bill of information or the return of a grand jury indictment is sufficient to institute a prosecution. For a criminal prosecution in Louisiana District Court—such as was involved in both *Jones* and *Gladden*—an information or indictment is required; the second sentence of article 382 says as much. But the fourth sentence of article 382 says that a criminal prosecution in city court may be instituted by affidavit. The courts in *Jones* and *Gladden* were not faced with a criminal prosecution in city court and their holdings cannot be interpreted to override the unambiguous statutory language of article 382.

I also write separately to express my inability to accept the presence of this prosecution in federal court. The tawdry activities brought to light at trial were undoubtedly unethical, probably criminal, and should not be tolerated in a democratic society. But not every case of small-town corruption is an appropriate target for

federal prosecution, and the Hobbs Act appears to be a particularly inappropriate vehicle for the present prosecution.

The case law under the Hobbs Act requires that it is the illegal act—here the extortion—which must affect interstate commerce. *See United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir.1978) ("more than a speculative attenuated 'one step removed' kind of effect"). I do not take issue with the Court's conclusion that only a minimal connection between the extortion and the effect on interstate commerce is required, but the tenuous connection between "fixed" DWI prosecutions in Monroe, Louisiana and interstate commerce in this case strains even the sturdy lines with which we suspend the legal fictions termed "interstate commerce analysis." Since it must be the effect which the *extortion* has on interstate commerce, not all of the far-fetched contingent consequences, I think we should sound once and for all to United States Attorneys and District Courts not to reach out to the Hobbs Act to bring every crooked small-town officeholder to justice.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4208

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICK H. WRIGHT, JR., and WILLIAM E. ARMSTRONG,
Defendants-Appellants.

Nov. 6, 1986

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, JOHNSON and JOLLY, Circuit Judges.

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR
REHEARING EN BANC

(797 F.2d 245, 5th Cir. 1986, August 18, 1986)

E. GRADY JOLLY, Circuit Judge:

On petition for rehearing, Wright and Armstrong urge, among other things, that the court erred in finding a nexus between the extortionate conduct and interstate commerce. Judge Brown in his dissent argued that this case never should have been brought in the United States District Court and that the extortionate conduct did not sufficiently affect interstate commerce to violate the

Hobbs Act. Judge Brown concluded his dissent, "I think we should sound once and for all to United States Attorneys and District Courts not to reach out to the Hobbs Act to bring every crooked small-town officeholder to justice."

Irrespective of whether we are sympathetic with a result that puts the federal government in the business of prosecuting petty crime of a purely local concern, we cannot say that the government has failed to establish every element required by the Hobbs Act, including a connection with interstate commerce, as elucidated in cases from this and other circuits as well as the Supreme Court.

To explain the majority holding of this case in its simplest terms, the district court found as a fact that the failure to prosecute drunk driving increases the number of wrecks on interstate highways. Wrecks on the highways impede the flow of interstate commerce thereby establishing the required connection between the extortionate conduct and interstate commerce. This connection fully satisfies the standard established in our cases that hold that the Hobbs Act requires only a minimal impact on interstate commerce. *E.g.*, *United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980); *United States v. Summers*, 598 F.2d 450, 454 (5th Cir. 1979).

Judge Brown would grant rehearing for the reasons stated in his dissent.

The petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CR 84-30012-01

UNITED STATES OF AMERICA

vs.

PATRICK H. WRIGHT, JR.

CR 84-30012-03

UNITED STATES OF AMERICA

vs.

WILLIAM E. ARMSTRONG

PARTIAL TRANSCRIPT OF PROCEEDINGS had on the 13th day of February, 1985, before His Honor Judge Nauman S. Scott, at the United States Federal Building, Monroe, Louisiana.

Reported by:

Nina J. White, Contract Court Reporter.

* * * *

Rough draft for edit.

FEBRUARY 13, 1985

THE COURT: Ladies and gentlemen, Mr. Marshal. would you secure the doors. I don't want people coming in and out. This is a very serious moment for the parties involved. And I wish to caution you that the court will not tolerate any sort of demonstrations during or after I have addressed these remarks and made my decision in this case. I must apologize for some degree for the haste with which these reasons have been accumulated. I have a number of papers here and much of what I will say will be ad libbed. It is my usual experience that the ad libbed opinion does not read as well as it sounds and that sometimes matters on which a Court has relied are not well stated or not fully stated or perhaps are omitted. For this reason, an occasion such as this, I always reserve the right to edit these remarks before they go into the transcript. I could defer giving you reasons and just give you my decision if I had any difficulty with the validity of this procedure. But I feel that I should insofar as I can deliver reasons for these remarks with the understanding that the opinion this afternoon is hastily constructed. I have had very little time to do that because I have also had to read some authorities, read some documents and exhibits which the parties have asked me to read, collect my thoughts and try to assemble them in a way which can at least be understandable to you if not done in an artistic manner so with these apologies and with that reservation, I will proceed. This matter is now before us on Counts 4, 5, 6, 9 and 10 of the indictment, judgments of acquittal having been granted previously by us on Counts 7 and 8. We will address first the factual basis on which our decision is grounded. This decision is not intended to be all inclusive comments on every contention in evidence or every factor considered by us in our deliberation but we hold that the evidence both direct and circumstantial when applied to each defendant is more than sufficient

to sustain beyond a reasonable doubt the conclusions which we have reached. I might say before beginning or getting into the matters of merit or particular matters of merit that the Court, that I am cognizant of the broad discretion bestowed upon City prosecutors in the performance of their duties and I feel that that is not the matter which is in contest in this proceeding. Here we are determined or to determine not whether the discretion exists but whether it was properly utilized. Secondly, I'm also cognizant of the volume of business carried on by the Monroe City Court. I'm cognizant of the fact that because of this volume, the procedures must be expeditious and that for the same reason, the files of both the official records and the attorneys' files are apt to be almost necessarily brief. However, I will not—I do not feel that the brevity or this lack of detail compels me to accept explanations of certain procedures taken in the and testified to by the parties simply because they fill in matters which are not contained in the file, the attorneys' file, the matters of various importance greatest importance in this suit and I'm not going to go through all these cases referred to. I don't think I have to. I think it would unduly delay you. I don't think it's necessary to the decision of this case but of grave importance is the three thousand dollars payment from Mr. Wright, Mr. Pat Wright, to Mr. William Armstrong in June of 1982. By no stretch of the imagination can this be called a referral fee. First Mr. Armstrong had no client to refer to Mr. Wright. Neither Mr. Armstrong nor anyone else has contended that Mr. Burns was a client of Mr. Armstrong's. Second, Burns was not even aware of such a fee arrangement. Clients in referral fee situations should be and are made aware of such sharing of fees. Thirdly, an Assistant City Prosecutor charged with the duty of representing the City in a prosecution of DWI offenders has a serious conflict of interest which presents an appearance of impropriety when he accepts three thousand dollars for sending a client to an attor-

ney to represent in a civil case which arose out of the same incident that the DWI offense, as the alleged DWI offense. Four, there was no agreement, verbal or written, between Mr. Armstrong and Mr. Wright or Mr. Wright's law firm providing for referral or a referral fee. In fact, the defendants themselves have testified that Armstrong suggested four or five attorneys to Burns and that it was Burns not Armstrong who was responsible totally for the choice of Mr. Wright as his attorney. Nor can we give credence reasonably to the contention that Wright was morally or felt morally obligated to give a three thousand dollar referral fee to Armstrong when there was no such agreement and when there was not even an expectation that such a fee would be paid. No other principal involved, not Armstrong, not Jack Wright, not Dennis Henen knew anything about the fee. That is, until May of 1982. There is absolutely no evidence that any other lawyer who has testified in this suit has paid or felt morally obligated to pay a referral fee under the circumstances found in the Burns case. We hold, therefore, that it is absolutely unreasonable that under these circumstances to believe that the three thousand dollars payment was a referral fee no matter how that word has been defined in these proceedings. Both Armstrong and Wright have testified that Armstrong did nothing to earn a referral fee. We agree that Armstrong did not have arrest authority nor the duty to arrest Burns and that Wright did not have the duty of surrendering his client for arrest. But Armstrong did do something. He did use his office in a manner which could have affected the outcome of the civil case. Wright testified in some detail, that is, Pat Wright about the quality of the civil case, that he had grave doubts about his chance of winning it. He stated that if it had been a good case, he would not have turned it over to Jack Wright, that he would have handled it himself. It is also a matter of record that the defense attorneys in the civil case made repeated inquiries of Armstrong about the status of the

criminal charges against Burns as did Jack Wright. Obviously the progress of this criminal matter was of interest to the attorneys in the civil case and might have had an effect upon it or it's outcome. Excuses as to why Burns was not prosecuted ranged from prescription which had not lapsed at the time the arrest warrant was recalled to a legal argument regarding the blood test and Louisiana Revised Statutes 32:661. We find that based on the statutory language of 32:661, and the Louisiana Supreme Court jurisprudence existing at that time that such an argument was not legally established. We further find that even a cursory search and notation of the statutes would have led Armstrong to conclude that such an argument was more in the prosecution's favor than the defendants. Yet Armstrong wrote a letter to Jack Wright and testified in this proceeding that he recalled the warrant after a conversation with Jack Wright who researched only the civil case. Armstrong testified that he had looked only at the statute. In other words, he made this decision only on his reading of the statute and strictly on the face of that statute. This indicates that he recalled the affidavit, the Burns affidavit and arrest warrant on or about March 16, I believe the date of that letter to Jack Wright. However, there is other evidence to the effect that the matter might have been recalled previous to that time. In that other evidence Officer Otwell had attempted to serve Burns in February of 1982 after finding ought that he resided in West Monroe. But when he went to look for the warrant, that is, the arrest warrant a few days later in order to give it to the Ouachita Parish Sheriffs Department, it was missing from the warrant file. This is in the police department. He then contacted Armstrong who said that the warrant had been recalled because of prescription, had been recalled at that time because of prescription. Now, there has been some evidence of conflict regarding this prescription as there is contention on the one side and sometimes argued by the defense that prescription begins to run

with the filing of the arrest warrant in the office of the City Attorney because the clerks in that office have been made deputy clerks of court. This question poses an argument in support of the contention that Mr. Wright could not have acted as the attorney in the criminal case. Well, it's the other way around. Has been to argue that the one year prescriptive period begins at that time and that one year from date of that filing, the case in which that affidavit was filed, if not then served, could be dismissed or recalled. This has been argued as being a time when all of these cases were susceptible of dismissal or recall and yet out of the same City Attorney's office, the police department has been informed that they must wait a period of two years before such affidavits lapse and should be returned for recall to the City Attorney's office. The other side of the argument is that prescription does not run, begin to run until the prosecution affidavit is filed in the Court. That seems to this Court to be a more logical explanation. I don't attempt to decide that, but seems to be more logical to me because at that time the defendant actually is on notice and is under threat of prosecution. And that has been offered or argued should be the correct prescriptive date. Be that as it may, and avoiding the obvious conflicts in these positions as they have been taken, certainly Mr. Armstrong is involved because he has made different excuses at different times as to why he took the actions. He certainly was a necessary party to the delay or rather not the delay, to the premature recall of that affidavit since by his offices and I can't say the instruction was given to the police department by Mr. Armstrong himself but because it was not that specific but cerainly the police department was instructed by the City Attorney's department that the arrest affidavit which would include one issue on Mr. Burns would not lapse for two years and come under the prescription which is applicable two years after the—well, the two year prescriptive period. So it would seem that in making that recall Mr. Armstrong

was violating the interpretation of his own department as to what prescriptive period applied. In other words, it be two instead of one year, and he acted so far as this Court is concerned in haste if he did indeed act, which I find that he didn't on the basis of the blood tests previously referred to. It seems to me that if the arrest warrant was not in the police files when Mr. Otwell sought it in February of 1982, and if at that time Mr. Armstrong informed him that it had been recalled because of prescription, that this wasn't the reason that it was recalled and I find under the department, police department's own interpretation that a two-year prescription not a one-year prescription was applicable and that this action was improperly done. I won't go through all these as I said before but referring strictly to the Robert Tallant matter, the date of that arrest was October 18, 1983. The date of arraignment was October 26, 1983. The date set for trial was December 9, 1983. On the latter date, Mr. Tallant went to Mr. Wright's office, paid him one hundred dollars and Mr. Wright secured a continuance. The trial was reset for January 13, 1984, and then on that date, was continued again with no date set for trial. The only other thing that's happened in that proceeding and only legal thing that's happened is that it was terminated by Mr. Armstrong on March 9, 1984. Now, there like the other, three other files, this is one of the files that was missing. I'm not inclined to necessarily give an awful lot of credence to the fact that these files were not in the C.O.W.D. file but it's alleged that they were out for the purpose of, at least three of them including the Tallant file, for the purpose of supervision. There is no evidence whatsoever that Mr. Tallant actually was put on DA's probation which would be the purpose of that. I might say that in this case Mr. Tallant paid on--I have forgotten what date, December, 1983, paid Mr. Wright a fee of twenty-five hundred dollars. The two defendants state and that's the only thing that was done in this case, that they were right so far as

trying it before it was terminated, that Mr. Tallant was put on DA's probation but there is nothing in the file, the brief file to back that up. Certainly it has been suggested in some of the instances here by counsel that if statements are made even by defendants, that they must be accepted by the Court because they're not disputed. I challenge that as a maxim of law. And I will not accept it in deciding this case. This is one instance in which as the Court said previously where it was the official file in City Court neither the official file in the Court nor the attorney's file is helpful. Mr. Wright's assertion that Tallant was on DA's probation is not supported by his office file and actually it is completely refuted in the opinion of this Court by his own taped statement of April, 1984, by Tallant's statements that he was never advised that he was on a DA's probation and these instructions appropriate to that and Mr. Wright's admission that Tallant was never so instructed. Under the circumstances here without going into further detail, and into other cases that have been part of this testimony, I find that—before I say that, I should also say that I find that in connection with Counts 4, 5, and 6 as to the effect of these lack of prosecutions in general on interstate commerce is apparent, that the lack, that this effect has been adequately demonstrated by the testimony of Mr. Voas, V-o-a-s, I think it is, as a general effect of these types of cases, and I find that the Burns matter here in this case has an obvious and accumulated effect on interstate commerce which would make and fulfill one of the elements under 1951. I therefore find the defendants guilty under Count 4, that defendant Armstrong is guilty under Count 5, that defendant Wright is guilty under Count 6. Now, as to Counts 9 and 10, both of these are against defendant Armstrong as to Count 9 which involves the release of Mr. Whittington's son from incarceration under a decision by the State District Court. Here I find that Mr. Armstrong was aware of the ethical dangers of his representing Mr. Whittington's

son in City Court since he had tried to get Mr. Hanson to do so, and that he showed and was guilty perhaps—well, undoubtedly, of unethical conduct in drafting proceedings and appearing in City Court to effect this result. However, I am aware also and I do believe that Mr. Armstrong felt honestly that the conviction which he had previously secured against Mr. Whittington's son was invalid and although he was in an indebted position to Mr. Whittington and that there are other matters which I might point out, I think connected with that indebtedness and I'm not prepared to say that indebted position of his had anything more to do with his position than perhaps to serve to accellerate the action he took. So I hold that the action perhaps was reprehensible from the point of view of ethics but I do not find it to be a violation of 1951. Count 10 has to do with the Tyler affair and here I find that Mr. Whittington interceded on behalf of Miss Tyler for reasons which the Court feels have nothing to do with any remuneration. I don't think he intended to recognize or give any sum of money or property to Mr. Armstrong. I don't think Mr. Armstrong did it to receive any such property. And in this case I think he was exercising properly his broad authority to act as he did in that particular instance. Consequently, I dismiss, give judgment of acquittal to Mr. Armstrong on Counts 9 and 10.

THE COURT: Sentence is set for Monday, March 18, 1985, in Alexandria, Louisiana, at 1:00 o'clock p.m. I know that both of these defendants are under bond and their bond will be continued. Court is adjourned.

(Whereupon the hearing was concluded.)